# The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement

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## I. INTRODUCTION

THE national scandal of living conditions in American prisons has been the subject of numerous articles and films.[1] Televised views of the horrors of over-populated prison life have pricked the nation's conscience. From time to time, an Attica tragedy occurs and the public is made acutely aware of the desperate plight of its citizen-inmates.[2] The universal wisdom is that our prisons have fallen woefully short in achieving their objectives — community protection, crime reduction, and offender rehabilitation.[3]

Since 1973, the American prison population has tripled, with no end in sight.[4] Increased prison population has not resulted in increased prison capacity. Paradoxically, even when states have undertaken massive building programs, they have often ended up putting more people in prison, further contributing to overcrowding. Conditions that were already deplorable have only continued to worsen.

In the early years of the Republic, the courts simply did not conceive of the Constitution as protecting prisoners from harsh treatment.[5] The criminal offender was regarded as a "slave of the State."[6] More recently, the judicial attitude supported a policy of non-interference in prison affairs. This policy, generally referred to as the "hands off" doctrine, made it virtually impossible for prisoners to get judicial relief from harsh living conditions and needlessly cruel punishment.[7] There were numerous occasions when the courts absolutely refused to consider severe and degrading circumstances of prison life. The judiciary explained that it had no role in regulating prison life.[8]

In the late 1960s and early 1970s federal judges learned about the barbaric conditions in state penitentiaries. Their exposure to the horrors committed in prisons resulted in a general shift in prisoners' rights jurisprudence away from the traditional "hands off" doctrine. The most striking development in prison law was the recognition by the federal bench that state prisoners were entitled to minimum constitutional standards

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1. *See, e.g.*, Aric Press, *Inside America's Toughest Prison*, NEWSWEEK, Oct. 6, 1986, at 46 (gripping story of the overcrowded conditions and brutal treatment of inmates in the Texas prison system); BRUBAKER (20th Century-Fox Film Corp. 1980) (graphic visual depiction of the Arkansas penal system).

2. *See* TOM WICKER, A TIME TO DIE (1975) (riveting story of Attica revolt).

3. There is an "endless, self-defeating cycle of imprisonment, release, and reimprisonment which fails to alter undesirable attitudes and behavior." President Johnson's message to Congress, 1 PUB. PAPERS 263, 264 (Mar. 8, 1965).

4. *Bureau of Justice Statistics Bulletin, U.S. Dept. of Justice, Prisoners in 1990* (1991).

5. *See* Hudson v. McMillian, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting).

6. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

7. For a historical review of the "hands off" theory, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

8. *See Hudson*, 112 S. Ct. at 1005-06 (citations omitted).

during their confinement.[9] A minor revolution occurred, and the principle means used to secure decent prison conditions resulted from interpretation of the cruel and unusual punishment clause of the Eighth Amendment. Federal judges, going beyond their traditional role, examined prisons in great detail, fashioning remedies touching on nearly every aspect of prison life, and ordering comprehensive reform.[10]

The Supreme Court, concerned about this new federal judicial activism, sought to clarify the federal role in the operation of state prisons. In 1981, in *Rhodes v. Chapman*,[11] the Court, in assessing the problems of overcrowding, had its first opportunity to consider the Eighth Amendment's application in a prison setting. The Court determined that conditions depriving inmates of the minimal civilized measure of life's necessities could be cruel punishment under contemporary standards of decency. But, in seeking to control the activist federal bench, the Court counseled the need for deference to prison administrators and state legislatures.[12] *Rhodes* sought to limit significantly federal involvement in ameliorating conditions at state prisons.

A decade later, in *Wilson v. Seiter*,[13] the Supreme Court took another giant step in the direction of halting prison reform. The Court proclaimed that challenges to sub-standard conditions can only succeed when inmates show that prison officials acted with a culpable state of mind.[14] Furthermore, the Court determined that overall conditions of prison confinement cannot rise to cruel punishment when there is no specific deprivation of a single human need.[15] By defining punishment in a narrow way the Court effectively undermined federal court leadership that had pressed for comprehensive improvements in state prisons across the Nation.

The Court's criticism of federal judicial activism is based upon two constitutional themes. One view is that the Supreme Court is troubled by the federal district courts ordering the expenditure of state public funds. The other asserts that the administration of prisons is primarily an executive function. This article maintains that the Supreme Court has yielded too much to federalism and to deference toward prison officials by placing too formidable a barrier in the path of prison reform.

Part II of this article briefly details the origin of the Eighth Amendment. Part III begins with the study of the lower federal courts' involvement in prison reform, and then traces the Supreme Court's emergence into prison conditions challenges. Part IV examines the new analytical

9. For a general discussion of the rise of the American penitentiary system and the development of prisoners' rights, see Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 B.Y.U. L. REV. 857 (1992).

10. *See* Michael S. Feldberg, Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977).

11. 452 U.S. 337 (1981).

12. *Id.* at 346-47.

13. 501 U.S. 294 (1991).

14. *Id.* at 296-302.

15. *Id.* at 304-06.

framework and the formidable barriers placed by the Court in the path of prison reform. Part V critiques the Court's misperception of state sanctioned punishment. Part VI looks behind the Court's stated rationale to the core reasons inhibiting federal court reform: separation of powers and federalism. Part VII endeavors to mark the proper boundaries of cruel punishment and to provide a perspective on Eighth Amendment jurisprudence.

## II. HISTORICAL BACKGROUND OF CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment, in three words, imposes the constitutional limits on punishment: it must not be "cruel and unusual."[16] The phrase "cruel and unusual" punishment first appeared in the English Bill of Rights of 1689,[17] and the framers of the Constitution copied the wording and adopted it with very little debate.[18] The British prohibition was directed at unauthorized punishments, as well as those disproportionate to the offenses committed.[19] It was aimed at the tortures practiced by the Stuart monarchy. In adopting the English phrasing, the primary concern of the American advocates was to ban "torture" and other "barbarous" methods of punishment.[20]

For almost a hundred years after its adoption, the Eighth Amendment was rarely invoked. It was believed that the clause, aimed at barbaric practices that were no longer in use, was obsolete.[21] When the Supreme Court finally turned toward the meaning of the clause in death penalty cases, it was not surprising that it focused on the particular methods of execution. The Court's first application was to compare the challenged method of execution to concededly barbarous methods.[22] The constitutionality of capital punishment was never at issue, but only the form employed to carry out the sentence. The Court determined that public

16. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

17. An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, WMD. 2d Sess. ch.2 (1688); *see* English Bill of Rights of 1689, *reprinted in* CARL STEPHENSON & FRANK MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL LAW (1937).

18. ANNALS OF CONG. 782-83 (J. Gales ed. 178)(noting the limited nature of the debate regarding the Eighth Amendment); *see* Weems v. United States, 217 U.S. 349, 368-69 (1910) (noting that after one speaker objected that the phrase was too indefinite, and another expressed his concern that it would abolish appropriate forms of punishment, a large majority adopted it without further debate).

19. *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 852-860 (1969).

20. *Id.* at 842.

21. *Id.*

22. *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . . ."); *In re* Kemmler, 136 U.S. 436, 446-47 (1890) (Punishments are cruel when they involve torture or a lingering death such as burning at the stake or crucifixion. Death by electrocution was a permissible mode of punishment.).

execution by firing squad did not violate the Eighth Amendment, but that punishments of torture and any others of comparable unnecessary cruelty were forbidden by the Constitution.[23]

At the start of the 20th century, in *Weems v. United States*,[24] the Court for the first time invalidated a penalty specifically prescribed by a legislature because the punishment was disproportionate to the severity of the offense.[25] The Court acknowledged that although the legislature had the Constitutional power to define crimes and determine punishments, the judiciary had the duty to review a statutory sentence to determine if it was cruel punishment.[26] Weems was sentenced to fifteen years at *cadena temporal* as well as deprived of his basic civil rights for the crime of falsifying an official document. The Court found that this punishment, which involves imprisonment in wrist and ankle chains at hard and painful labor,[27] was excessive in relation to the offense and therefore was cruel punishment.[28] Weems' punishment for making a false entry in a document was more severe than Philippine law provided for more serious crimes including several degrees of homicide, treason, incitement of rebellion, and conspiracy to destroy the government by force.[29] The Court overturned the sentence, determining that justice required that the punishment must be proportional to the offense.[30] Consequently, by the beginning of the twentieth century, the Supreme Court had expanded its view of the Eighth Amendment to include both the method of execution and the length and conditions of punishment.

The most significant aspect of *Weems*, however, was the Court's introduction into Eighth Amendment jurisprudence the principle that the prohibition of cruel and unusual punishment, to be viable, must be given wider application than the mischief which gave it birth.[31] The Eighth Amendment was to keep pace with the increasingly enlightened views of society. The Court insisted that the Eighth Amendment was not to be static, but was to be constantly emerging to meet changing social conditions.[32] Progressive interpretation to conform to enlightened public view of human justice was the message put forth.[33]

A half century later, Chief Justice Warren echoed this view, positing that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[34] There was to be no static test, for the

23. *Wilkerson*, 99 U.S. at 136. The Court stated that unconstitutional forms of punishment included being "emboweled alive, beheaded, . . . quartered, . . . public dissection . . . and burning alive. . . ." *Id.* at 135.
24. 217 U.S. 349 (1910).
25. *Id.* at 381-82.
26. *Id.* at 378-79.
27. *Id.* at 363-64.
28. *Id.* at 381-82.
29. *Id.* at 380.
30. *Id.* at 380-81.
31. *Id.* at 366-67.
32. *Id.* at 367.
33. *Id.* at 378.
34. Trop v. Dulles, 356 U.S. 86, 100 (1958).

Eighth Amendment was to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[35] The state's power to punish must be exercised within the limits of civilized standards.[36] Even during wartime, the loss of citizenship for wartime desertion was considered cruel punishment because denationalization represented the total destruction of an individual's status in an organized society and stripped him of political existence.[37] The denationalized individual had lost the right to have rights.[38] In effect, denationalization represented a more primitive form of cruel punishment than torture. The protection of human dignity emerged as the Eighth Amendment's central theme.

For generations, the courts regarded the Eighth Amendment as applying only to cruel punishment meted out by the sentencing judge in accordance with statute, and not to any hardship that might befall a prisoner during incarceration.[39] The Supreme Court remained virtually silent on the Eighth Amendment rights of incarcerated prisoners, although it had on occasions spoken on other aspects of prisoners' rights — access to the courts,[40] the free exercise of religion,[41] and the freedom of speech[42] and press,[43] together with equal protection[44] and due process.[45] But for almost two centuries the Supreme Court failed to address the actual conditions endured by citizens confined in prison.[46]

Once the Supreme Court ruled that the Eighth Amendment applied to the States,[47] it was only a matter of time before the federal courts would be confronted with numerous state prison cases alleging truly brutal and inhumane conditions. The federal judiciary was now going to be forced to view and assess the barbaric conditions in state prisons.

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35. *Id.* at 101.

36. *Id.*

37. *Id.* at 101-02. The Court also noted that the word "unusual" added nothing to the meaning of the clause other than to signify "something different from that which is generally done." Id. at 100-01 n.32.

38. *Id.* at 101-02.

39. *See* Hudson v. McMillian, 112 S. Ct. 995, 1005-06 (1992) (Thomas, J., dissenting). But compare Justice White's view that this reasoning disregards decisions where the Court made it clear that conditions are themselves *part of the punishment*, even though not specifically "meted out by statutes or sentencing judges." Wilson v. Seiter, 501 U.S. 294, 306 (1991) (White, J., concurring).

40. Johnson v. Avery, 393 U.S. 483 (1969).

41. Cruz v. Beto, 405 U.S. 319 (1972).

42. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977).

43. Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974).

44. Smith v. Bennett, 365 U.S. 708 (1961).

45. Wolff v. McDonnell, 418 U.S. 539 (1974).

46. It was not until Estelle v. Gamble, 429 U.S. 97 (1976), 185 years after its adoption, that the Court applied the Eighth Amendment to a deprivation of medical needs suffered by an inmate in prison.

47. The *Trop* "evolving decency" standard would be limited if the States were not obligated to follow its command. This was accomplished in Robinson v. California, 370 U.S. 660 (1962) when the Court, looking at contemporary human knowledge, found state imprisonment for the disease of addiction to narcotics to be cruel punishment. The Court, in comparison, commented that even one day in state prison for the "crime" of having a cold would be unconstitutional. *Id.* at 667.

## III. CONDITIONS OF CONFINEMENT — THE PRISON CASES

### A. THE BEGINNING: THE LOWER FEDERAL COURTS

Historically the judiciary played no role in supervising prison conditions. The courts were reluctant to become involved in the operation of either state or federal prison systems. The universal wisdom was that the courts had no power to interfere with the warden's discretion regarding the treatment and security of his charges.[48] The courts believed they satisfied their responsibility once they rendered sentence. The federal courts adopted a broad "hands off" policy toward prison administration. The main reasons given to support this policy included federalism, separation of powers, and lack of expertise in the field of penology.[49]

Correctional resources, never amply funded by the states, lagged behind burgeoning prison populations.[50] Public apathy contributed to the pervasive neglect of state prisons. To the extent that prison conditions were harsh, this appeared to be part of the penalty that criminals paid for their conduct against society. But imprisonment was not to be an open door for unconstitutional cruelty and neglect.[51] Lower federal judges began to hear about serious privations of basic human needs that deprived inmates of minimal civilized measures of life's necessities.

In the late 1960s, the "dark and evil" world of the Arkansas Penitentiary was exposed to a courageous federal judge[52] and subsequently to the entire nation. The Arkansas prisoners initiated an unprecedented judicial attack on the state's archaic penitentiary system. What Chief Judge Henley learned about the Cummins Farm Unit and the Tucker Reformatory was "completely alien to the free world."[53] Inmates were tortured by electrical shocks and beaten with leather straps. Faced with the threat of death, they were forced to work ten hours a day, six days a week, sometimes in inclement weather and without adequate clothing. Trusty "inmate guards,"[54] with the power over life and death, supervised the daily routine of the prison.[55] Trying to escape forcible sexual violence and stabbings, the inmates in the barracks would "cling to the bars all night."[56] A sentence in the Arkansas Penitentiary amounted to "banishment from civilized society" to a damnable place.[57]

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48. *See generally* Note, *Beyond the Ken of the Courts*, *supra* note 7.

49. *See infra* notes 203-228 and accompanying text.

50. Rhodes v. Chapman, 452 U.S. 337, 357 (1981) (Brennan, J., concurring).

51. *Id.* at 369.

52. Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

53. *Id.*

54. A trusty inmate guard is an inmate with administrative responsibilities. *Id.* at 373-76.

55. "It is within the power of a trusty guard to murder another inmate with practical impunity, and the danger that such will be done is always clear and present." *Id.* at 374.

56. *Id.* at 377.

57. *Id.* at 381. Even today, remnants of the brutal power exercised by trustees and condoned by prison officials survive. *See* Press, *supra* note 1, at 46.

The court approached the problems in the Arkansas prisons in a comprehensive fashion. Faced with these degrading conditions, Chief Judge Henley turned to the "cruel and unusual punishment" clause of the Eighth Amendment and found a constitutional violation in the climate of fear and hatred produced through the brutal and capricious exercise of power by the trusties.[58]

> It is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation. . . . However constitutionally tolerable the Arkansas system may have been in former years, it simply will not do today . . . .[59]

Judge Henley viewed the Eighth Amendment as applying to the prison population and not solely to individualized treatment.[60] The general deplorable conditions, rather than any one practice, were determined to constitute cruel punishment. Judge Henley placed ultimate responsibility on the Commissioner of Corrections, and required that he submit a detailed plan to ameliorate these conditions.[61] As a sanction for noncompliance he threatened to shut down the prisons.[62]

The Arkansas system regrettably proved not to be an aberration. Over time other judicial opinions emerged which described the gruesome daily conditions and experiences in state prisons. The atrocities and mismanagement in American state prisons had at last been thrust upon the federal judicial conscience.[63]

Chief Judge Frank Johnson detailed the "horrendously overcrowded" conditions prevailing in the Alabama penal system, to the extent that inmates were required to sleep on mattresses placed on the floors in hallways and next to urinals.[64] Rampant violence prevailed; robbery, rape, and assault being "everyday occurrences among the general inmate population."[65] Food was often infested with insects and served without adequate utensils. As described by a United States health officer, the Alabama prisons were "wholly unfit for human habitation according to

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58. *Holt*, 309 F. Supp. at 381.

59. *Id.*

60. It appears to the Court, however, that the concept of "cruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to a punishment directed at him as an individual. In the Court's estimation confinement itself within a given institution may amount to a cruel and unusual punishment . . . where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.

*Id.* at 372-73.

61. *Id.* at 385.

62. *Id.*

63. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (Mass. 1973).

64. Pugh v. Locke, 406 F. Supp. 318, 323 (M.D. Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978) (per curiam).

65. *Id.* at 324.

virtually every criterion used for evaluation by public health inspectors."[66]

A federal appeals court declared that the Colorado State Penitentiary at Cannon City was also "unfit for human habitation."[67] The health care was "blatant[ly] inadequat[e],"[68] the food unsanitary; the whole institution "fraught with tension and violence,"[69] often leading to serious injury and death.

The Mississippi State prisoners at Parchman experienced similar destructive conditions of confinement.[70] Carefully describing the deleterious effects of inhumane living conditions and the danger of prisoner mistreatment by armed trusty guards and other inmates, the federal judge found the housing at Parchman "unfit for human habitation under any modern concept of decency."[71] The judge parenthetically criticized the public and official apathy regarding these conditions.

At last, the lower federal courts became all too familiar with the basic inhuman conditions and experiences that formed the essence of the inmates' daily existence. These courts emerged as the critical force behind the efforts to correct the pernicious situation. They ordered the states to improve the physical plants and, when necessary, other prison practices. Under federal supervision, state prisoners were to have "adequate provision for their physical health and well-being. . . ."[72] The courts continued to monitor progress, adopting an activist role in the supervision of the states' penal systems. The federal courts retained jurisdiction so that changes would not be abandoned, but would eventually be permanently established. For the most part, federal judicial intervention had been beneficial to the correctional system and broader community.[73] By 1980, when the Supreme Court for the first time agreed to consider fully the principles relevant to cruel and unusual confinement claims, individual

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66. *Id.* at 323-24.

67. Ramos v. Lamm, 639 F.2d 559, 570 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

68. *Id.* at 574.

69. *Id.* at 572.

70. Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 489 F.2d 298 (5th Cir. 1973).

71. *Id.* at 887. "The facilities at all camps for the disposal of human and other waste are shockingly inadequate and present an immediate health hazard." *Id.* Regarding the competency of the trusty guards the court stated:

> Penitentiary records indicate that many of the armed trusties have been convicted of violent crimes, and that of the armed trusties serving as of April 1, 1971, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders.

*Id.* at 889.

72. *Id.* at 894.

73. Rhodes v. Chapman, 452 U.S. 337, 359-60 (1981) (Brennan, J., concurring) (citing M. KAY HARRIS & DUDLEY P. SPILLER, JR., NATIONAL INST. L. ENFORCEMENT & CRIM. JUST., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 21 (1977)).

Justice Brennan also quotes prison officials who have acknowledged that judicial intervention has helped them gain needed reform. *Id.* at 360-61 (Brennan, J., concurring).

prisons or entire prison systems in at least twenty-four states[74] had been declared unconstitutional, with over 8,000 pending cases filed by inmates.[75]

### B. THE SUPREME COURT LOOKS AT PRISON CONDITIONS — *RHODES V. CHAPMAN*: JUDICIAL RESTRAINT AND THE DEFERENCE REQUIREMENT

*Rhodes v. Chapman*[76] marked the United States Supreme Court's first consideration of a full-fledged Eighth Amendment claim based upon prison conditions. Although the Court, in *Estelle v. Gamble*,[77] established that prison officials had an obligation to provide medical care to its inmates, and that deliberate indifference to their serious medical needs constituted an "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment,[78] the decision advanced a relatively narrow principle. Justice Powell, writing for the *Rhodes* majority, believed he had a fresh slate on which to consider prison conditions in the context of the Eighth Amendment.

The *Rhodes* facts unquestionably presented an easy target for criticism of the activist role the federal bench had assumed. The Southern Ohio Correctional Facility (SOFC), as described by the district court, was "unquestionably a top-flight, first-class facility."[79] It was atypical of the sort of institutions in which federal courts had ordinarily been involved. Its only failing was the practice of "double celling" prisoners caused by overcrowding. The overcrowding did not overwhelm the SOCF's facilities or staff. The food was adequate in every respect. The heating, plumbing and ventilation were adequate. The cells were substantially free of offensive odor, and the noise in the cellblocks was not excessive. Overcrowding had not reduced significantly the availability of space for visitation, or for stays in the dayrooms, nor had it rendered inadequate the library resources, although inmate job opportunities had been "watered down." There was no indifference to medical or dental needs by the staff, although there were isolated instances of neglect. Even though violence had increased with the prison population, evidence was lacking that double celling itself caused greater violence.[80] "Despite these generally favorable findings, the District Court concluded that double celling at SOCF was cruel and unusual punishment."[81]

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74. *Id.* at 353-54 n.1 (Brennan, J., concurring).

75. *Id.* at 354 n.2 (Brennan, J., concurring).

76. 452 U.S. 337 (1981).

77. 429 U.S. 97 (1976).

78. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

79. Chapman v. Rhodes, 434 F. Supp. 1007, 1009 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981).

80. *Rhodes*, 452 U.S. at 342-43.

81. *Id.* at 343.

Justice Powell disagreed, finding no constitutional mandate for "comfortable prisons."[82] Powell emphasized that to constitute cruel punishment, prison conditions must be extreme.[83] To the extent that conditions may be harsh, that is the penalty the inmate must pay for his crime. Double celling at SOCF did not increase violence among inmates, nor did it "lead to deprivations of essential food, medical care, or sanitation."[84] Whatever discomfort double celling might have caused, it fell far short of violating the Constitution.[85] Aspirations toward an ideal environment may be appropriate, but these considerations are more properly weighed by the legislature and correctional authorities rather than the Court.[86] To control the activist federal bench, Justice Powell counseled caution and the need for deference to prison administration and state legislatures.[87]

Justice Powell's opinion was moderate in that it discouraged lower federal court activism more by exhortation than by drawing bright lines. Justice Brennan wrote a concurring opinion to emphasize that *Rhodes* should in no way be considered a retreat from the lower federal courts careful scrutiny of prison conditions.[88] Justice Brennan told the federal courts that they must examine inmates' "needs and services" and should measure their sense of contemporary standards of decency against the actual effect of prison conditions upon the well-being of the inmate.[89] Brennan had no doubt that the prisoners at SOCF were "adequately sheltered, fed, and protected, and that opportunities for education, work and rehabilitative assistance [were] available."[90] Although overcrowded, the prison was "one of the better, more humane, large prisons in the nation."[91]

Justice Blackmun, fearful that some language by the majority might be regarded as a signal for the federal courts to adopt a policy of general deference, wrote separately to emphasize that the Constitution and federal courts "together remain as an available bastion" against unconstitu-

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82. *Id.* at 349.
83. *Id.* at 348-49.
84. *Id.* at 348.
85. *Id.* at 347-48.
86. *Id.* at 349.
87. *Id.* at 352.
88. *Id.* at 353 (Brennan, J., concurring). Justice Blackmun and Stevens joined in Justice Brennan's opinion.
89. *Id.* at 364.
90. *Id.* at 366.
91. *Id.* at 367. Justice Marshall, the sole dissenter, disputed the Court's findings. He contended that the prison was "overcrowded, unhealthful, and dangerous." *Rhodes*, 452 U.S. at 370 (Marshall, J., dissenting). The prison was operating at 38% above design capacity, with some two-thirds of the inmates serving lengthy or life sentences. Double celling was not a short-term response to a temporary problem, with many of the inmates spending most of their time in their cells. He credited the expert testimony that these "close quarters" would likely increase the incidents of mental disorders and that the double celling had increased tension and "aggressive and anti-social characteristics." *Id.* at 374 n.7 (quoting *Chapman*, 434 F. Supp. at 1017). Marshall agreed with the lower federal court that the harm caused by double celling went "well beyond contemporary standards of decency." *Id.* at 375.

tional cruelty.[92] Perceiving, as Justice Brennan had, that the majority opinion might send the wrong message, Justice Blackmun joined Justice Brennan in advising federal courts that they "must continue to be available to those state inmates who sincerely claim that the conditions to which they were subjected are violative of the Amendment."[93]

Although the Justices were in general agreement as to the result in *Rhodes*[94] (due mostly to its relatively easy facts), the respective positions taken by the Justices in the battle over the federal judicial role in assessing state prison conditions was its most important contribution. Justice Powell infused his opinion with principles of deference in order to restrain the lower court. He noted that the Court previously sketched the complex and intractable problems in American prisons — issues that are not readily susceptible to easy resolution, and that require "expertise, comprehensive planning, and the commitment of resources. . . ."[95] These characteristics, he noted, are all "peculiarly within the province of the legislative and executive branches of government."[96] Justice Powell told the federal courts that they cannot assume that state legislatures and prison officials are insensitive to the Constitutional requirements.[97] He was willing to trust state officials to fulfill their constitutional obligations.

Justice Brennan's concurrence painted a more sordid picture. After describing the sorry history of state prison conditions, he perceived that "the soul-chilling inhumanity of conditions in American prisons [had] been thrust upon the judicial conscience."[98] The lower courts, he noted, had never been eager to usurp the task of running prisons, but they learned from bitter experience that judicial intervention was essential if constitutional dictates were to be followed in the prisons.[99]

*Rhodes* signaled that a majority of the Court was uncomfortable with broad federal judicial efforts to reform state prisons. The policy of judi-

92. *Id.* at 369 (Blackmun, J., concurring).

93. *Id.* Justice Blackmun's concurrence in Block v. Rutherford once again highlighted his concern that the Court had embarked on a process of "substitut[ing] the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting." 468 U.S. 576, 593 (1984) (Blackmun, J., concurring). Acknowledging that there may sometimes be a danger of excessive court activism, he encapsulated his view of current Court direction concluding that "careless invocations of 'deference' run the risk of returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a 'hands off' approach." *Id.* at 594.

94. Justice Marshall contended that overcrowded prison conditions are harmful to the inmates and must be eliminated. Marshall agreed with the district court that the permanent practice of double celling at SOCF was cruel punishment. *Rhodes*, 452 U.S. at 375 (Marshall, J., dissenting). Justice Marshall stated that "[t]he conclusions of every expert who testified at trial and of every serious study of which I am aware is that a long-term inmate must have to himself, at the very least, 50 square feet of floor space . . . in order to avoid serious mental, emotional, and physical deterioration." *Id.* at 371.

95. *Rhodes*, 452 U.S. at 351 n.16 (quoting Procunier v. Martinez, 416 U.S. 396, 404-05 (1974)).

96. *Id.*

97. *Id.* at 352.

98. *Id.* at 354 (Brennan, J., concurring) (quoting Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (Mass. 1973)).

99. *Id.* at 354 (Brennan, J., concurring).

cial restraint sharply divided the Court, but the majority view was clear: the federal courts may intervene in state correctional matters, but only grudgingly even in the face of harsh prison conditions. To accomplish this goal, the *Rhodes* majority added to the Eighth Amendment formula an additional ingredient: the requirement of deference.[100]

The Justices' disagreement was not limited merely to the federal role in state corrections, but also found expression in marking the boundaries of Eighth Amendment jurisprudence. The "ban on cruel and unusual punishment [was] one of the most difficult to translate into judicially manageable terms."[101] There was no objective referent. The protection of "human dignity" emerged as its central theme;[102] but this provided little analytic guidance and demanded a strong measure of judicial subjectivity. If the Court was to control judicial activism, as the majority clearly wanted to, then it was required to curb the federal judges' reliance on their subjective personal moral sensibilities. Specifically, the Court had to shape abstract concepts such as "human dignity" and "evolving standards of decency" into concrete terms. These concepts were vague and flexible and permitted dynamic remedial discretion in lower courts. The Court had the power to reign in those federal judges tempted to use expansive equitable remedies to solve complex prison problems, and this, it was determined to do.

### C. *Wilson v. Seiter*:[103] Formidable Barriers to Judicial Review of Prison Conditions

Pearly Wilson was a felon incarcerated at the Hocking Correctional Facility (HCF), a medium security prison, in Nelsonville, Ohio. Alleging that a number of his conditions of confinement ran afoul of the Eighth Amendment, he brought an action under 42 U.S.C. § 1983 against the director of the Ohio Department of Rehabilitation and Correction and the warden of HCF.[104] Wilson complained of overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean lavatories, unsanitary eating facilities and food preparation, and improper housing with mentally and physically ill inmates.[105] Wilson charged that the authorities, after notification, had failed to take remedial action.[106] The director and warden denied that some of the conditions existed and disclosed efforts by prison personnel to improve the others.[107]

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100. For a criticism of the deference model see Gutterman, *supra* note 9, at 898-905.

101. Furman v. Georgia, 408 U.S. 238, 376 (1972) (Burger, J., dissenting).

102. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958); *see also* Gregg v. Georgia, 428 U.S. 153, 229 (1976) (Brennan, J., dissenting) ("[A] punishment must not be so severe as to be degrading to human dignity.").

103. 501 U.S. 294 (1991).

104. *Id.* at 296. Wilson sought, in addition to compensatory and punitive damages, declaratory and injunctive relief. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*; *see also* Wilson v. Seiter, 893 F.2d 861, 862-63 (6th Cir. 1990).

A sharply divided Court, led by Justice Scalia writing for the five-member majority, determined that the infliction of punishment is by definition "a deliberate act intended to chastise or deter."[108] Justice Scalia reasoned that if the pain inflicted by the prison conditions was "not formally meted out *as punishment* by the statute or the sentencing judge,"[109] then some mental element must be attributed to the prison officials responsible for the care of the inmate in order for it to be prohibited by the Eighth Amendment.[110] Scalia refused to acknowledge that the courts and prisons are interconnected components of a continuous system of criminal justice and that judicial responsibility may continue into the correctional phase.

Reviewing past Eighth Amendment challenges to prison deprivations, Justice Scalia divined both an objective component (was the deprivation serious enough?)[111] and a subjective component (did the official act with a sufficient culpable state of mind?).[112] Specifically, inmates challenging serious constitutional deprivations in confinement must show that prison officials behaved in a wanton manner, for it is only their "deliberate indifference" to the challenged conditions that can amount to a constitutional violation.[113]

Justice Scalia also placed an additional obstacle in the path of prison reform. Even a cursory reading of the majority opinion in *Rhodes* indicated that the Court had adopted an aggregate theory of harm. As *Rhodes* proclaimed, "[c]onditions . . . alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities."[114]

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108. *Id.* (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.), *cert. denied*, 479 U.S. 816 (1986)).

109. *Id.* at 300.

110. *Id.*

111. In conditions of confinement cases, extreme deprivations must be shown to constitute an Eighth Amendment claim. The prisoner must, as in *Wilson*, be denied the "minimal civilized measure of life's necessities," 501 U.S. at 304 or, as in *Estelle*, be refused treatment for "serious medical needs," Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

But in excessive force cases, the objective component is always satisfied anytime a prison official maliciously and sadistically uses force to cause harm. Hudson v. McMillan, 112 S. Ct. 995, 1000 (1992). The inmate does not have to suffer serious injury to sustain a claim of cruel punishment. *Id.* Compare Justice Thomas' view that prison officials use of force that does not result in *significant harm* may be immoral, tortious, and criminal, but does not amount to cruel and unusual punishment. *Hudson*, 112 S. Ct. at 1005 (Thomas, J., dissenting).

112. *Wilson*, 501 U.S. at 298.

113. *Id.* at 300. Justice Scalia made no attempt to define "deliberate indifference." The term is subject to several possible meanings that would largely determine the impact of *Wilson*. Judge Posner had contended that "deliberate indifference" is comparable to "recklessness" in criminal law. Duckworth v. Franzen, 780 F.2d 645, 652-53 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). To constitute "deliberate indifference" the prison official must possess "actual knowledge of impending harm easily preventable." *Id.* at 653. Under this view, "deliberate indifference" may not encompass gross negligence. *Id.*

The Supreme Court, in Farmer v. Brennan, 114 S. Ct. 1970 (1994), adopted this view. Equating "deliberate indifference" with subjective recklessness as used in the criminal law, the Court required that for inmates to succeed in Eighth Amendment claims they must show that prison officials were subjectively aware of a substantial risk of serious harm to them. See the discussion of *Farmer*, *infra* notes 166-75 and accompanying text.

114. *Rhodes*, 452 U.S. at 347.

Based upon *Rhodes*, the lawyers for Wilson contended that "[a] court cannot dismiss any challenged condition, [for] as long as other conditions remain in dispute, [they] must be 'considered part of the overall conditions challenged.' "[115] Justice Scalia clearly recognized that the totality of conditions approach made possible very intrusive remedies. He wanted to assure that the punishment clause not be used as a tool for prison reform. What *Rhodes* meant, wrote Scalia, was that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect . . . for example, a low cell temperature at night combined with a failure to issue blankets."[116] But "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."[117] For a prisoner to succeed on his Eighth Amendment claim, Scalia declared, he must show a deprivation of an "identifiable human need such as food, warmth, or exercise."[118] There was to be no "seamless web" of prison conditions for Eighth Amendment purposes.[119]

## IV. FORMIDABLE BARRIERS TO PRISON REFORM: THE NEW ANALYTICAL FRAMEWORK

The Supreme Court placed two formidable barriers directly in the path of prison reform. First, the prisoner must prove the deprivation was sufficiently grave to form the basis of an Eighth Amendment violation.[120] Second, he was required to establish that the prison administration acted with a culpable state of mind with respect to these deprivations.[121] These twin elements, the objective and subjective components of an Eighth Amendment prison claim, presented high hurdles, the consequence of which was to make life more difficult in many state prisons.

### A. The Objective Component

#### *1. Deprivation of a Single Identifiable Human Need*

The Eighth Amendment's prohibition had traditionally been interpreted as forbidding intolerable practices — brutal forms of punishment. The lower federal courts found no difficulty in drawing the analogy be-

115. *Wilson*, 501 U.S. at 304.
116. *Id.* at 304.
117. *Id.* at 305.
118. *Id.* at 304.
119. *Id.* at 305.
120. *Id.* at 304-05. Compare Hudson v. McMillian, 112 S. Ct. 995 (1992), where the Court held that in excessive force cases, even minor injuries to the inmate may amount to cruel punishment. Although Officer McMillian punched the handcuffed and shackled prisoner several times in the eyes, chest and stomach, he received only minor injuries. The Court found the objective component to be "responsive to contemporary standards of decency." *Id.* at 100 (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976). "When prison officials maliciously and sadistically use force to cause harm contemporary standards of decency are always violated." *Id.*
121. *Wilson*, 501 U.S. at 299.

tween objective physical punishment and inhumane prison conditions. The convict was sent to prison as the punishment, not for additional punishment. The federal courts expressed what was implicit in its developing cases: Those confined in state prisons had a constitutional right to "adequate provision for their physical health and well-being."[122] The obligation of the state to treat its inmates with decency and humanity was a right the federal courts would not overlook. Unquestionably, vague Eighth Amendment concepts were used to correct abusive conditions and to secure specific levels of treatment of inmates. But there was no doubt that the federal courts had shown that they were capable of upgrading the American prison system.

When faced with horrendous conditions in the state penitentiary systems, the federal courts abandoned the "hands off" approach in favor of broad prison reform.[123] Lower federal courts scrutinized all facets of prison confinement to measure the physical and psychological harm to inmates. Conditions which separately did not violate the Eighth Amendment were aggregated to determine if their sum transgressed the Constitution.

A "totality of conditions" model offered hope for significant reform of prison conditions.[124] The broader evil required a more comprehensive response. Going beyond the traditional model, the federal judges examined state prisons in detail and fashioned remedies touching upon nearly every aspect of prison life. The totality approach was calibrated to disclose a system-wide level of abuse which was more easily determined (having reached an extreme) than that found in the deprivation of a single condition. The federal courts considered all features of prison life intending to protect and safeguard the inmate from an environment of physical, moral and emotional degeneration.[125] Mostly these courts tailored the Eighth Amendment to the contours of institutional life.

Once the court found that the sum of living conditions violated the Constitution, it ordered massive reforms. In *Pugh v. Locke*,[126] for example, the federal district court promulgated a detailed eleven-part program: "Minimum Constitutional Standards for Inmates of Alabama Penal System."[127] The standards covered the maximum population in Al-

122. Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972).

123. *See generally* Gutterman, *supra* note 9; Note, *Beyond the Ken of the Courts*, *supra* note 7.

124. *See generally* Feldberg, *supra* note 10.

125. *See, e.g.*, Battle v. Anderson, 564 F.2d 388, 393 (10th Cir. 1977) ("to protect and safeguard a prison inmate from an environment where degeneration is probable and self improvement unlikely . . ."); Miller v. Carson, 401 F. Supp. 835, 873 (M.D. Fla. 1975) (jail described as evoking "the psychological feeling of being trapped in a dungeon"), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977); Collins v. Schoonfield, 344 F. Supp. 257, 268 (D. Md. 1972) ("inmates . . . live in conditions of physical, moral and emotional degradation and terror").

126. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part and rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978), *cert. denied*, 438 U.S. 915 (1978).

127. *Id.* at 332.

abama prisons; the equipment and facilities in each cell; the degree and type of medical care; and sanitary measures to govern living conditions and food preparation and distribution.[128] The court required that educational, vocational, and recreational opportunities be provided.[129] The comprehensive nature of these standards was not unique, as other federal courts had adopted similar remedial approaches.[130] The lower federal courts had done more than simply declare that a specific prison condition was bad and order it corrected; the widespread malignancy required more serious surgery. Moving beyond the traditional model, the district judges used their equitable power to issue broad reforms: positive prospective orders that affected every aspect of prison life.[131] The federal courts increasingly became the managers of complex institutional changes requiring continuing involvement in prison administration.[132]

Severe overcrowding was the fuel that generated the barbaric conditions. An overcrowded environment contributed to tension and stress, violence and homosexuality.[133] It was the spark behind numerous prison riots.[134] By examining the entire institution, the federal courts began to catalogue the individual factors that contributed to the barbarism: physical abuse by guards and other inmates; lack of medical care; poor sanitation in the overall living conditions and especially food preparation; and the absence of educational, vocational, or recreational opportunities. These factors existed in combination, each affecting the other. Taken together they had a cumulative impact on the inmates.[135]

By looking at the entire institution, the federal courts offered inmates the hope of significant reform of prison living conditions. Federal courts intervened in state prison administration when prison conditions became so degrading that confinement was unusually severe and served no penal purpose more effectively than some less severe punishment.[136] Mandating these extensive prison reforms pushed the federal courts to the outer limits of their power.

The federal courts viewed prison conditions as affecting more than the physical existence of the inmate. The conditions of confinement also affected the ability to make moral choices — to be self-determining within the legitimate confines of prison. Lack of jobs, vocational training and other forms of rehabilitation obviated the ability to choose. Boredom, tension and frustration contributed to incidents of violence. The magni-

128. *Id.* at 332-34.
129. *Id.* at 332.
130. *See generally* Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977).
131. *See* Feldberg, *supra* note 10, at 370.
132. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (discussing judicial activism).
133. TOM WICKER, A TIME TO DIE 84-90 (1975).
134. *Id.*
135. *See Holt*, 309 F. Supp. at 373.
136. *See* cases cited *supra* notes 48-75 and accompanying text.

tude of idleness combined with the total lack of rehabilitative programs aided in the physical and mental deterioration of the inmate.[137] When the court spoke of human dignity, it meant respect for the inmate's autonomy — the convict's capacity for self-determination. Although incarceration drastically restricted an inmate's range of choices, it did not eliminate his moral worth nor diminish his capacity to make choices that did not interfere with legitimate prison concerns.

Fear of excessive judicial activism forced Justice Scalia to find the appropriate model to limit the power of federal courts to meddle in the complex administration of daily prison life. In *Wilson* Scalia pushed for bright lines to discourage federal court intervention in state prisons. He repeated a past admonition that the Constitution does not require comfortable prisons.[138] It is only those deprivations serious enough to deny the inmate " 'the minimal measure of life's necessities' [that] are sufficiently grave to form the basis of an Eighth Amendment violation."[139] The conditions must result in the deprivation of a core human need.[140] Although the Court had apparently approved the totality model, Scalia decided that this was just too amorphous.[141] In his opinion, a series of harsh but not unconstitutional conditions could not add up to an aggregate infringement of the Eighth Amendment.[142] Even though the Eighth Amendment's "protections extend to the whole person as a human being,"[143] each facet of prison life was to be evaluated separately. When no prison condition independently breached the Eighth Amendment, Scalia argued to leave the prison alone. When a specific condition crossed the threshold, then Scalia would remedy only that condition. A piecemeal approach that limited judicial intervention only to specific unconstitutional conditions would set the boundaries of federal relief. The lesson Justice Scalia taught was that if a single human need is violated the court should remedy only that specific deprivation and not broaden its horizon to all conditions in the prison.

In *Rhodes* the Court cautioned lower federal courts not to use the Eighth Amendment as a vehicle for prison reform, for model standards "simply did not establish the constitutional minima."[144] Although *Rhodes* insisted that " 'Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges,"[145] the constitutionality of punishment continued to be measured by broad and idealistic

137. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part and rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978), *cert. denied*, 438 U.S. 915 (1978).

138. *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 U.S. at 349).

139. *Id.*

140. *Id.* at 304.

141. *Id.* at 305.

142. *See, e.g.*, Wright v. Rushen, 642 F.2d 1129, 1133-34 (9th Cir. 1981).

143. *See* Laaman v. Helgemoe, 437 F. Supp. 269, 307 (D.N.H. 1977).

144. *Rhodes*, 452 U.S. at 348 n.13 (quoting Bell v. Wolfish, 441 U.S. 520, 543-44 n.27 (1979)).

145. *Id.* at 346 (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)).

concepts of dignity, and conditions of confinement alone or in combination were not permitted to deprive the inmate of the minimal of life's necessities.[146] Prior to *Wilson* the lower federal courts used both criteria: objective factors as well as the highly subjective view whether the overcrowded conditions violated the "dignity of man." It was undoubtedly true that the district court typically provided little analytical guidance. The judge usually described in detail the prison conditions caused by overcrowding and, with a recitation to vague Eighth Amendment standards, provided a comprehensive plan to improve conditions. Justice Scalia, in *Wilson*, sought to correct this practice. By refusing to recognize the interdependency of prison conditions, Scalia required more specific showings of the actual effects of overcrowding, examples of actual physical danger,[147] not just anticipated debilitating psychological effects. The equitable remedies the federal courts had promulgated were just too costly in terms of federal judicial time and state finances.[148] The Court's position was crystal clear: It was uncomfortable with the federal bench applying broad equitable remedies to reform state prisons. By rejecting the "totality model," the Court fostered a narrow view of when prisons run afoul of the Eighth Amendment.

### 2. *The Potential Risk of Harm - Physiological and Psychological*

The *Wilson* majority focused on concrete evidence of immediate physical harm arising from conditions of confinement. The Court drew the line at actual serious harm that occurred due to the prison officials' deliberate indifference. By comparison a more capacious approach would encompass conditions that expose prisoners to the potential risk of serious injury. One such identified risk was under consideration in *Helling v. McKinney*:[149] the health hazard posed by involuntary exposure of a nonsmoking prison inmate to the environmental tobacco smoke (ETS) of his five-packs-a-day smoking cellmate.[150]

*Helling* presented an opportunity for the Court to adopt an expansive reading of the Eighth Amendment to prison circumstances. It was now Justice White's turn. Writing for an overwhelming majority, he was willing to consider future physical harm as part of the constitutional calculus. White rejected the government's central thesis that only deliberate indifference to current serious health problem of inmates is encompassed

146. *Id.* at 347.

147. *See* Wilson v. Seiter, 893 F.2d 861, 865 (6th Cir. 1990) (absence of prior physical violence involving any inmate leads to conclusion that fear is not reasonable), *vacated*, 501 U.S. 294 (1991). See *supra* notes 103-19 and accompanying text for a discussion of the Supreme Court's treatment of *Wilson*.

148. *See* Ruiz v. Estelle, 553 F. Supp. 567, 593 (S.D. Tex. 1982) (estimating that the relief authorized would cost the state of Texas $1,000,000,000).

149. 113 S. Ct. 2475 (1993).

150. McKinney, a Nevada state prisoner, sought injunctive relief and damages from the director of prisons, the warden, and others for violating his Eighth Amendment right to freedom from cruel and unusual punishment. He complained of health problems allegedly caused by environmental tobacco smoke. *Id.* at 2478.

within the protection of the Eighth Amendment.[151] To him, at least, it was not a novel proposition that the Eighth Amendment protects against future harm to inmates. Under Justice White's view, unsafe life-threatening conditions need not await a tragic event to require a remedy. The lack of fire safety devices need not await a fire to demonstrate deliberate indifference to an inmate's safety.[152]

As a result, the *Helling* majority produced a decision that has the potential to substantially broaden the compass of the Eighth Amendment. *Helling* manifested a sharp alteration in the Court's attitude. As a majority of the Court made clear, the Eighth Amendment prohibits prison conditions that pose a grave and imminent threat to future physical harm.[153] With respect to this objective factor, scientific and statistical evidence alone was insufficient proof. What was also required was an assessment that the risk of harm was so grave that it violated contemporary standards of decency.[154]

But would the principles apply to psychological harm?[155] It is certainly not hard to find prisons that pose serious risk of psychological harm without corresponding physical harm.[156] Harm in its ordinary sense surely includes a notion of risk of "psychological injury." Serious risk of psychological pain can often be clinically diagnosed and measured through established processes.[157] Where Justice Scalia, in *Wilson,* may have sanctioned long-term psychological suffering, Justice White, in *Helling*, stepped forward and embraced a sensitivity to the nontemporal nature of the Eighth Amendment. In applying the *Helling* rationale, the risk of psychological as well as physiological harm may now be very relevant to whether the "effects of overcrowding" affront the human dignity of the prisoner. Consequently, the *Helling* decision appears to be less than consistent with the Court's philosophy of judicial restraint. Although it is too early to speculate, prison reformers may have found some hesitant allies in their movement.

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151. *Id.* at 2480-81.

152. *Id.*

153. In Farmer v. Brennan, 114 S. Ct. 1970 (1994), the Court reconfirmed that a prisoner may obtain preventive relief. The subjective awareness factor in the deliberate indifference test does not require prisoners to suffer physical injury before obtaining court-ordered correctional relief for inhumane prison conditions. *Id.* at 1983-84. *See infra* notes 166-75 and accompanying text for a discussion of *Farmer.*

154. Helling v. McKinney, 113 S. Ct. 2475, 2482 (1993). "[T]he prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id.* The requirement of a smoke-free environment has gained support in this country. *See, e.g.*, 49 U.S.C. § 1374(d)(1)(A) (1988) (domestic airline flights).

155. Justice Blackmun has emphasized that there is no Court precedent that psychological harm is not cognizable by the Eighth Amendment. Hudson v. McMillian, 112 S. Ct. 995, 1004 (1992) (Blackmun, J., concurring).

156. *Id.* Justice Blackmun would include psychological harm in the meaning of pain. Justice Blackmun feared that the majority opinion would be read to exclude psychological pain as non-measurable. To this he contended that psychological pain can be more than *de minimus.* It can often be clinically diagnosed and qualified through well established methods. *Id. See also Hudson*, 112 S. Ct. at 1009 (Thomas, J., dissenting) ("That is not to say that the injury must be, or always will be, *physical.*").

157. *Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring).

### B. The Subjective Component - Defining Deliberate Indifference

Paralleling the historical discarded "hands off" theory utilized when the courts had been reluctant to become involved in the operation of state correctional systems, Justice Scalia, in *Wilson*, wished to confine, as much as possible, judicial responsibility for prison conditions. As a further restriction on activist judges tempted to find state prisons constitutionally deficient, Justice Scalia found in the Eighth Amendment formula an additional element: the need for a culpable state of mind on the part of prison officials.[158] Scalia noted that the source of an intent requirement is not the predilection of the Court, but is embodied in the Eighth Amendment.[159]

In *Wilson* the Court rejected a reading of the Eighth Amendment that imposed responsibility solely on objective inhumane prison conditions.[160] The *Wilson* majority for the first time declared that *all* prison condition claims under the Eighth Amendment must show that prison officials acted with "deliberate indifference" in causing harm.[161] The Court in *Estelle v. Gamble*[162] first articulated the standard, but never explained its exact meaning. *Estelle* held that in the context of inadequate medical treatment of prisoners, neither an inadvertent failure or negligence in diagnosis or treatment rose to the level of deliberate indifference.[163] *Wilson* did not define the phrase either, but set the parameters somewhere between a "malicious and sadistic" standard[164] and negligence.[165]

In *Farmer v. Brennan*[166] the Supreme Court sought to explain the meaning of "deliberate indifference." Dee Farmer, a preoperative transsexual projecting feminine characteristics, was transferred for disci-

158. *Wilson*, 501 U.S. at 302.

159. *Id.* at 300. The majority did not dispute that pain or suffering that is specifically imposed by statute or judge on convicted criminals is subject to Eighth Amendment scrutiny. The specific purpose of the English Declaration of Rights of 1688 (the predecessor of the Eighth Amendment) was to curtail the torture and barbarous treatment all too frequently inflicted during the reign of the Stuart Kings. *See* Granucci, *supra* note 19, at 842.

160. *Wilson*, 501 U.S. at 299-302.

161. *Id.*

162. 429 U.S. 97 (1976).

163. *Id.* at 105-06.

164. The "malicious and sadistic" standard was first applied in Whitley v. Albers, 475 U.S. 312 (1986) in response to an excessive force claim stemming from a prison riot. Albers, an inmate, sought damages under the Eighth Amendment for injuries resulting from a gunshot wound to the knee suffered during an attempt by prison guards to quell a riot. In these situations the prison officials' actions are typically made "in haste, under pressure, and frequently without the luxury of a second choice." *Id.* at 320. Because the prison official applied the force in good faith in order to restore peace, the Court refused to find a violation of the inmate's Eighth Amendment rights. The Court held that to succeed the prisoner must show that the officials acted "maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21. Several years later, in Hudson v. McMillan, 112 S. Ct. 995 (1992), the Court applied the malice standard to all cases of excessive force by prison officials. *Id.* at 999. The Court did so in recognition of the similarity found between prison riot cases and those involving lesser disturbances. *Id.*

165. *Wilson*, 501 U.S. at 302-03.

166. 114 S. Ct. 1970 (1994).

plinary reasons from a federal correctional institute to a federal penitentiary (typically a higher security facility with more troublesome prisoners) and placed in the general population. Farmer claimed that he was beaten and raped by another inmate and sought damages and injunctive relief barring future confinement in any penitentiary. Farmer alleged that the federal officials at both institutions acted with "deliberate indifference" to his safety in violation of the Eighth Amendment, because they knew that the penitentiary to which he was transferred had a violent history of inmate assaults and that he was particularly vulnerable to sexual assault.[167]

Justice Souter, writing for the Court majority, specifically recognized that "[h]aving incarcerated 'persons with demonstrated proclivities for antisocial criminal, and often violent, conduct,' . . . [and] having stripped them of virtually every means of self-protection . . . the government and its officials are not free to let the state of nature take its course."[168] Although he acknowledged that prison rape is not constitutionally tolerable and that an inmate can obtain relief before being victimized, Justice Souter rejected Farmer's request to adopt an objective test for "deliberate indifference."[169]

Determining that "deliberate indifference" lies somewhere between the poles of "negligence" at one end and "purpose or knowledge" at the other end,[170] Justice Souter adopted the "familiar" criminal law standard of *subjective recklessness* as consistent with the cruel and unusual punishment clause.[171] "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[172] Whether the prison official had the subjective awareness is a question of fact. Reasonable prison officials will recognize risks that are obvious, but the inference cannot be conclusive, "for we know that people are not always conscious of what reasonable people would be conscious of."[173]

Justice Souter, regarding as incompatible with *Wilson* a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhuman prison conditions, required instead that responsibility be based on a consciousness of risk. The Justice doubted that this subjective appraisal would present prison officials with any serious motivation "to take refuge in the zone between 'ignorance of obvious risks' and 'actual knowledge of risks' "[174] for if the risk is "longstanding, pervasive, [and] well-documented" and the circumstances suggest that the prison official had been exposed to the

167. *Id.* at 1974-76.
168. *Id.* at 1977.
169. *Id.* at 1983.
170. *Id.* at 1977-78.
171. *Id.* at 1979-80.
172. *Id.* at 1979.
173. *Id.* at 1981.
174. *Id.*

information, this could be sufficient for a finding that the official had actual knowledge of the risk.[175]

## V. THE NATURE OF STATE SANCTIONED PUNISHMENT: A CRITIQUE

The particularized requirement of subjective deliberate indifference by prison officials misperceives the nature of state-sanctioned punishment. Inadequate classification and safety precautions for inmates, poor medical treatment, and unsanitary food preparation and distribution may arise from legislative neglect rather than prison policy. The legislature, judiciary, and correctional personnel are all components of a continuous system of administration of justice. The state entity has an obligation to treat its citizen-inmates with decency and humanity. This responsibility, although shared, does not negate "institutional obligations." As federal Judge Henley made clear in *Holt v. Sarver*:[176]

> [T]he obligation of [prison officials] to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what prison officials] may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.[177]

Justice Stevens anticipated the limiting nature of imposing mental culpability as part of Eighth Amendment jurisprudence. Stevens argued in *Estelle* that the Court improperly attached significance to the motivations of the state corrections department personnel.[178] He reasoned that although subjective motivation may dictate the appropriate remedy, the character of the punishment determines whether the constitutional standard has been violated.[179] Justice Stevens vigorously proclaimed that "[w]hether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman."[180] In *Wilson* Justice White echoed Stevens' view, asserting that the Court's past decisions made it clear that the conditions of prisoners' confinement "are themselves *part of the* punishment."[181] Criticizing the majority for misapplying this *dictum* of an earlier case, White contended that the majority's intent requirement was not only a departure from precedent, but would likely prove impossible to apply.[182] It was altogether unclear whose intent should be examined. White asserted that intent is simply not meaningful when challenging a prison system, because "[i]nhumane prison

175. *Id.* Additionally, the subjective test did not require a prisoner to actually suffer physical injury before obtaining relief. *Id.* at 1983-84.
176. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).
177. *Id.* at 385.
178. *Estelle*, 429 U.S. at 116 (Stevens, J., dissenting).
179. *Id.*
180. *Id.*
181. *Wilson*, 501 U.S. at 306 (White, J., concurring).
182. *Id.* at 310.

conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time."[183]

Fearing that the ultimate result of *Wilson* would be that serious deprivations of a prisoner's basic needs will go unredressed due to a meaningless search for "deliberate indifference," Justice White characterized the majority approach as "unwise."[184] He also agreed with the Justice Department's position that requiring mental culpability might allow prison officials to interpose a "fiscal defense": that despite good faith efforts to obtain funding, monetary constraints beyond their control prevented the elimination of inhumane conditions.[185] In his view, the state, having chosen imprisonment as a form of punishment, "must ensure that the conditions in its prisons comport with the 'contemporary standard of decency' required by the Eighth Amendment."[186]

Justice Scalia, in *Wilson*, manipulated the Eighth Amendment in the prison condition context, turning it from a substantive limit on state-imposed punishment to a provision that basically polices the warden's conduct. Scalia forbade the courts to conduct a constitutional inquiry into what may be clearly subminimal prison conditions absent deliberate indifference by prison officials. In so doing, he disregarded the conceptual difficulty of distinguishing the indifference to the inmates' obvious needs by a government entity distinct from that of the prison official.[187] Where *Rhodes* counseled deference and directed federal courts to be cautious in policing prison conditions, *Wilson* implied that even barbaric prison conditions may fall outside the ambit of the Eighth Amendment.

In *Farmer*, Justice Souter sought to ensure that prison officials fulfill their constitutional duty to prevent inmate victimization. But, by being faithful to *Wilson's* "myopic focus on the intentions of prison officials,"[188] he never challenged or reconsidered its basic theory. Being constrained by *Wilson*, the *Farmer* theory may still excuse continuous inhumane treatment when the prison officials are doing the best they can.[189] As Justice

183. *Id.*

184. *Id.* at 311.

185. *Id.* at 310. Justice White noted that circuit courts had held inadequate funding not to be a defense to allegations of unconstitutional prison conditions. *Id.* at 311 n.2.

186. *Id.* In Farmer v. Brennan Justice Blackmun agreed with Justice White that it was state-sanctioned punishment that was prohibited by the Eighth Amendment: "Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably." *Farmer*, 114 S. Ct. at 1988 (Blackmun, J., concurring).

187. *See Farmer*, 114 S. Ct. at 1980-81 (refusing to adopt the objective test of Canton v. Harris, 489 U.S. 378 (1989), permitting liability when a municipality disregards "obvious" risks in failing to train its employees properly). "*Canton's* objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our case." *Farmer*, 114 S. Ct. at 1981.

188. *Id.* at 1988 (Blackmun, J., concurring.)

189. Justice Blackmun criticized Souter's reliance on *Wilson's* requirement of a prison official's culpable mental state. "[T]o the effect that barbaric prison conditions may be beyond the reach of the Eighth Amendment if no prison official can be deemed individually culpable, in my view is insupportable in principle and is inconsistent with our prece-

Souter pointed out, the prison officials' duty under the Eighth Amendment is to ensure "reasonable safety," and they will be free of responsibility if they respond reasonably to known health and safety risks even if harm is not ultimately averted.[190] Apparently, as long as prison officials act with just a minimum sensitivity to the condition of their charges, the federal courts may not interfere. Accordingly, whether the Eighth Amendment has been violated turns not on the character of punishment, but rather on the motivation of the warden.[191]

Prison population has risen rapidly in recent years, with further increases likely. Population gains have for the most part outpaced construction of new prison facilities.[192] Double and even triple celling is a common response to increased prison population. Overcrowding, the source of a variety of poor prison conditions, compounds the system's most pervasive problem: the physical safety of the convict. The high levels of violence associated with prison overcrowding have been a key factor in establishing cruel punishment in prison condition cases.[193] Homosexual rape within male prisons continues to occur with frightening frequency. Even Supreme Court justices are aware that a youthful inmate may be subjected to gang rape on his first night in jail.[194]

The Court's theory of punishment (absent deliberate indifference by prison officials) confines punishment to that "formally meted out" by the sentencing judge. Today, newspapers daily detail the deplorable conditions in prisons. Books, magazines, and periodicals constantly bombard us in graphic detail with the brutal and degrading conditions in state penitentiaries. An Attica type prison riot compels the whole nation to look at the places we condemn our fellow citizens to endure. Television news programs show the daily existence of prisoners, usually concluding with the mandatory picture of prisoners sleeping on floor mats next to overflowing toilets. It seems unlikely that state judges are not familiar with conditions in their state prisons. Does the sentencing judge, aware of the existence of these conditions, "formally mete out punishment" by sending his charge to one of these prisons? Or must he actually proclaim: "Son, I'm purposefully sending you to a Hell Hole."

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dents interpreting the Cruel and Unusual Punishments Clause." *Id.* at 1986 (Blackmun, J., concurring).

190. 114 S. Ct. at 1982-83.

191. *See* Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting) ("[W]hether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.").

192. NATIONAL INSTITUTE OF JUSTICE, 3 AMERICAN PRISON AND JAILS 33 (1980).

193. *See, e.g.*, Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977); Ruiz v. Estelle, 503 F. Supp. 1265, 1303 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). For a list of court decisions that document the pervasive violence among prisoners, see *Farmer*, 114 S. Ct. at 1987 (Blackmun, J., concurring).

194. *See* United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting). In *Farmer*, Justice Blackmun noted that overcrowding may explain many of the prison system's problems. 114 S. Ct. at 1987 (Blackmun, J., concurring).

Prison conditions are also intimately tied to the entire punishment process. Defense counsel plea bargain arrangements often include recommendations for incarceration in minimum security facilities. To protect their clients from other inmates' physical and emotional abuse in "tough prisons," defense counsel will often urge their clients to "cooperate" with state agencies. On this level, a court that incorporates these plea agreements (functionally, if not formally) into the sentence has decided on a quantum of punishment. By sending prisoners (those refusing to plea or cooperate) to the "other prison," the court is countenancing the conditions of their confinement. Does not the sentencing judge's tacit approval of the differences in punishment suffered subject the prison conditions to the scrutiny of the punishment clause of the Eighth Amendment?

Perhaps prison conditions should be viewed as expressly provided in the sentence. In effect, when all conditions of confinement are considered as authorized by the sentencing judge, the role that punishment theory plays in prison conditions becomes critical. This, of course, requires an assessment of the "penological purpose" of the penalty imposed. In *Rhodes*, Justice Powell moved toward a retributive philosophy. Prisons need not be "comfortable" and, even if "harsh" or "restrictive," they are "part of the penalty" to be paid.[195] Justice Brennan, in contrast, emphasized the value of rehabilitation. Not only must the physical, mental and emotional health of the inmate not be threatened, but prisons should not create "a probability of recidivism and future incarcerations."[196] In evaluating prison conditions, opportunities for education, work, and rehabilitative assistance are important.[197] For Brennan, the rehabilitative model must be part of the constitutional equation.[198]

Put succinctly, the touchstone of Eighth Amendment jurisprudence is "the effect upon the imprisoned."[199] *Holt v. Sarver*,[200] the first significant prison condition case, is illustrative of a court that approached the problems in the Arkansas prison system in a comprehensive fashion. The test of unlawful confinement was whether the objectionable conditions and practices were so bad as to be shocking to the consciences of reasonably civilized people. The use of severely crowded open barracks and isolation cells, the trusty guard system, the lack of supervision, and the existence of unrestrained inmate brutally combined to make the entire system cruel punishment.[201] The Arkansas government may not have had in mind overcrowded, unsafe, and unsanitary confinement conditions

195. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).
196. *Id.* at 364 (Brennan, J., concurring).
197. *Id.* at 366.
198. *Id.* at 364.
199. *Id.* at 366. See *Farmer*, 114 S. Ct. at 1986 (Blackmun, J., concurring) ("[I]nhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind.").
200. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *see supra* notes 52-62 and accompanying text.
201. *Holt*, 309 F. Supp. at 372-82.

when it set its correctional budget. Nor may the sentencing judge have realized he was sending the convicted to a "dark and evil" world. As Judge Henley viewed the Arkansas system, regardless of whether prison officials tried to improve the fate of those unfortunate enough to be confined there, the conditions in the prisons were cruel and inhuman.[202]

## VI. AT THE CORE OF PRISON REFORM: THE ALLOCATION OF POWER

### A. Separation of Powers: The Control of the Public Fisc

Two interconnected constitutional themes account for most of the criticism of federal "judicial activism." The first view maintains that the administration of prisons is exclusively an executive function. The other is concerned with courts (especially federal courts) ordering the expenditure of state public funds.[203]

Prison litigation chronicles an important transformation between the judiciary and other branches of government. The Supreme Court has always felt it important to respect the judgment of correction officials, influenced, no doubt, not only by their expertise, but also by a fear that serious separation of powers issues would arise if the courts began to run the prisons.[204]

Are the courts displacing executive and legislative power in a way that violates separation of powers? Only after it became clear that no relief would be voluntarily forthcoming were the federal courts dragged into prison reform.[205] Judicial activism was directly attributable to legislative and executive inaction. The problem arose, of course, because these branches of state government were unwilling, or unable, to devote scarce resources to the improvement of correctional facilities. Budgetary matters were often debated by the media. The inmates, with no political clout, had few opportunities to persuade. To the familiar cry of judicial meddling was added the equally heard refrain that prisons are not meant to be comfortable.

Spiraling crime rates, staggering recidivism, and longer prison terms required increasing amounts of public funds to run the penitentiaries. The present budget-cutting atmosphere called for greater economies and prisons, assuredly, felt the effects. Budgetary matters pushed the issue to the forefront. Fiscal concerns were guiding prison jurisprudence. Framing remedies for constitutional violations is costly.[206] Justice Scalia was

202. *See* Estelle v. Gamble, 429 U.S. 97, 116-17 (1976) (Stevens, J., dissenting).

203. Problems of judicial intrusion into the operations of large public institutions are shared by other forms of institutional litigation, especially school desegregation and mental health. *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980).

204. Bell v. Wolfish, 441 U.S. 520, 548 (1979).

205. *See* Eisenberg & Yeazell, *supra* note 203, at 495-96.

206. Federal Judge Anthony A. Alaimo ordered the Georgia Corrections Department to spend $60.2 million "to improve, modernize and expand" the Georgia State Prison in Reidsville and to "replace its dangerous [overcrowded] open dormitories with single cells."

aware that federal judicial authority to allocate funds raised sensitive issues regarding the limits of the federal courts intruding on state legislative prerogatives.

Questions about the federal judiciary's role in allocating state public resources to improve state prisons was never directly confronted by the Court. Nevertheless, the free floating fiscal management by the federal judiciary was the evil Justice Scalia sought to control. But he was just not candid enough to admit that the allocation of this power, rather than the professed constitutional restriction on the jurisprudential meaning of punishment, was his concern. Recognizing this fact illuminates much of the controversy over prison litigation. Budgetary considerations about the costly relief necessary to remedy abusive conditions involves an obvious direct expenditure of public funds. Scalia reflected, in part, his belief that the allocation of state resources to correctional facilities is solely a legislative choice.

Separation of executive from legislative responsibility was most assuredly behind Scalia's rejection of the Justice Department's argument that a state-of-mind inquiry might permit prison officials to hide behind a "fiscal defense theory": that despite all their good faith efforts to obtain funding, fiscal constraints beyond their control prevented them from eliminating inhumane conditions.[207] Justice Scalia did not directly say, but implied, that in this situation there may be no remedy. For even if that were the case, he finds it hard to understand how it could control the meaning of "cruel and unusual punishment."[208] For Justice Scalia, prison officials' mental culpability is implicit in the meaning of the word "punishment," and should not be altered for policy considerations.[209] At any rate, he observed, prison authorities, as yet, have not sought to use this as a defense.[210]

Justice Scalia's theory may be considered a pinched view of shared constitutional responsibility. Legislatures have traditionally shown minimum inclination to provide funds for basic institutional improvement. Segmenting responsibility exposes a conceptual difficulty. A state legislative body that deliberately fails to fund its prisons sufficiently to ensure that conditions do not fall below constitutional standards is insulated from

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Jingle Davis, *Judge Whose Rulings Changed State Prison Drops in for Visit — Once "Grim" Facility Passes Surprise Test*, ATLANTA CONST., June 19, 1990, at D1.

207. *Wilson*, 501 U.S. at 301. A rare alliance was forged in *Wilson* when the Justice Department joined the American Civil Liberties Union in urging rejection of intent. As argued by the United States, "[s]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end." *Id.* at 311 (White, J., concurring) (citing brief for the United States as *amicus curie* at 19).

208. *Id.* at 301.

209. *Id.* at 301-02.

210. *Id. See* Alberti v. Sheriff of Harris County, 937 F.2d 984, 999 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992) (implying that inadequate funding may constitute a valid defense as the trial record failed to "offer substantial evidence that the state's actions were constrained by legislative refusal to fund the [proposed remedy]").

challenge when other state officials appointed to oversee the prisons have tried to correct these inhuman conditions. The paradox is that state prisoners have no remedy when the cruelty of their confinement is sought to be corrected by concerned prisons officials. The prison conditions may be exactly the same, but prisoners fortunate enough to have administrators who turn a blind eye to their daily plight may receive judicial recognition, while those concerned with the inmates' well-being may have, in fact, only hurt their charges' cause. As state imposed punishment, the status of the correctional facilities that the state legislature permits should be considered part of the punishment. Justice Scalia attempts to extract the legislative branch from the social structure, permitting a parsed, detached neutrality regarding its role in maintaining humane prisons. The state may now be at liberty to give its prisoners only those constitutional conditions that "fit comfortably within its budget."[211]

Justice White, in his *Wilson* concurrence, recognized that the majority opinion, despite its professed intellectual rigor, had narrowed the vision regarding the state's responsibility in the administration of state-sanctioned punishment. In White's view, the majority position was unprincipled: "Having chosen to use imprisonment as a form of punishment, a state must ensure that the conditions in its prisons comport with the 'contemporary standards of decency' required by the Eighth Amendment."[212] White believed that the majority approach was "unwise," leaving open the possibility that prison officials will defeat constitutional challenges to inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from state legislatures rather than by any deliberate indifference on their part.[213] The majority position may have been "unwise," but it was not inadvertent. Although the lower federal courts had established that inadequate funding did not excuse the perpetuation of unconstitutional conditions of confinement,[214] Justice Scalia, apparently, did not totally agree.

Problems of judicial intrusion into the operations of large public institutions are shared by other forms of institutional litigation, especially school desegregation and mental health care.[215] There is always an unstated uneasiness about judicial allocation of public funds as well as concern about the capacity of courts to rank priorities. But almost every time a court expands or enforces individual rights, a necessary consequence is the reallocation of the public funds. Obviously, whenever the Supreme Court requires the states to provide indigents with counsel at trial or on appeal, or with other special assistance, the inevitable consequence is the increased expenditure of public funds.

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211. Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part*, 438 U.S. 781, *cert. denied*, 438 U.S. 915 (1978).

212. *Wilson*, 501 U.S. at 311 (White, J., concurring).

213. *Id.*

214. *See* cases cited in *Wilson*, 501 U.S. at 311 n.2.

215. *See* Eisenberg & Yeazell, *supra* note 203.

The Court has correctly recognized the primacy of state legislative and executive authorities to manage their prisons. Action by these politically accountable authorities would be preferable because they offer more hope for significant long-term improvement of prison conditions. Moreover, they may go beyond constitutionally compelled minimums. Nevertheless, there is no constitutional provision that requires state legislative and executive bodies to be the sole or final determiner of constitutional prison conditions. When they failed to act, lower federal courts stepped in not to supervise prisons, but to enforce the constitutional rights of prisoners.[216]

## B. FEDERALISM

*Wilson* did not directly address the fundamental questions of federal-state relations which arise whenever federal courts issue decrees that regulate state institutions. Although Justice Scalia did not use federalism to build his case for slowing prison litigation, it is implicit in his opinion. Principles of federalism require a proper respect for state functions and demand that the federal government protect federal rights "in ways that will not unduly interfere with the legitimate activities of the States."[217] In prison reform, the primary maxim is that federal courts simply do not sit to oversee state prisons.[218] But as Justice Brennan observed, no one even minimally acquainted with prison litigation can honestly suggest that the federal courts had ever been overeager to interfere with the states' legislative or executive responsibility to run their prisons.[219]

The sad tale of *Holt v. Sarver*,[220] the federal courts' first serious foray into state prisons, is representative of federal reluctance to intrude upon state prerogatives. *Holt* embodied all the elements of the federal-state melodrama: atrocious prison conditions, a strong-willed federal judge, and an obstinate state bureaucracy. Although Chief Judge Henley found that the conditions at the Arkansas prison were degrading, disgusting, and inhumane, for many months he permitted state authorities to fashion the appropriate remedies. The court repeatedly showed its reluctance to remove primary responsibility from state agencies. At first the court simply ordered Arkansas officials to make "a prompt and reasonable start toward eliminating" wretched conditions.[221] No detailed institutional changes were ordered. Only after it was apparent that Arkansas was not about to clean its own house did the court begin to issue detailed decrees. But even after three years, the federal court of appeals held that Arkan-

216. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972).
217. Younger v. Harris, 401 U.S. 37, 44 (1971).
218. *See* Frank M. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 911 (1976).
219. *Rhodes*, 452 U.S. at 354 (Brennan, J., concurring).
220. 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I); 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *see* discussion of *Holt*, *supra* notes 52-62 and accompanying text.
221. *Holt*, 309 F. Supp. at 383.

sas had not yet provided a constitutional environment within the prisons.[222]

The federal judges learned from bitter experience that federal judicial intervention was indispensable if Arkansas prisoners were to be protected. Other federal courts also concluded that when a critical stage had been reached, it required their intervention. These courts (reluctantly, at first) mandated a broad range of standards governing physical facilities, staffing, rehabilitation programs — virtually every facet of prison life.[223]

The Supreme Court has always shown a strong sensitivity to issues of federalism. The Court has compelled a respect for state functions, requiring the federal government to protect federal rights, but "in ways that will not unduly interfere with legitimate activities of the states."[224] The case for federal intervention is weakest when the state has shown a sensitivity to the suffering of its inmate population. But most state penitentiaries against whom lower federal judges issued orders were already entangled in a pervasive pattern of constitutional violations.

Evidenced by the repeated need for federal judicial intervention,[225] too often state governments had been truly insensitive to the requirements of the Eighth Amendment. Justice Brennan acknowledged that federal courts must and do recognize the primacy of the state to administer their prisons; but he felt no need to defer to them when they did not conform to constitutional minima.[226]

Pressed by tight budgets and public apathy, conscientious prison administrators are often caught in the middle as state legislatures refuse "to spend sufficient tax dollars to bring conditions in outdated prisons up to minimally acceptable standards."[227] Justice Scalia in *Wilson* had taken far too sanguine a position on the motivations of state legislators. Many state correction officials had learned through sad experience that state governments resist spending scarce resources to correct unconstitutional prison conditions until directed by the federal judiciary.[228]

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222. Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 200 (8th Cir. 1974). The district court in *Holt* noted with approval the changing attitudes and efforts of the legislative, executive, and administrative officials in Arkansas. The Trusty system had been abolished, and widespread unconstitutional conditions were no longer officially sanctioned. The state had acquired law libraries for both institutions and had retained a full-time physician to administer medical aid to the inmates. Holt v. Hutto, 363 F. Supp. 194, 198-200 (E.D. Ark. 1973), *aff'd in part, rev'd in part sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974).

223. *See supra* notes 48-75 and accompanying text for a discussion of the initial involvement of the lower federal courts in prison reform.

224. Younger v. Harris, 401 U.S. 37, 44 (1971).

225. *See Rhodes*, 452 U.S. at 353-54 n.2 (Brennan, J., concurring).

226. *Id.* at 362.

227. Johnson v. Levine, 450 F. Supp 648, 654 (D. Md.), *aff'd in part*, 588 F.2d 1378 (4th Cir. 1978).

228. *See Rhodes*, 452 U.S. at 358 n.7 (Brennan, J., concurring). For example, William G. Nagel, a New Jersey corrections official for 11 years testified that he had "learned through experience that most states resist correcting unconstitutional conditions or operations until pressed to do so by threat of a suit or by directive from the judiciary." *Id.*

## VII. PERSPECTIVE ON CRUEL PUNISHMENT: MARKING THE BOUNDARIES

In modern times, prisons are the only institutions that completely subjugate the citizen to government power. The State bears the ultimate responsibility for each citizen's imprisonment. Of course, the Constitution does not mandate comfortable prisons, and what is desirable does not establish a constitutional minimum. Rather these are goals to achieve. Agreement may be reached that double celling in the context of a particular prison may not be desirable, and yet such condition may not violate principles of decency.[229] So how do we mark the boundaries?

For example, how may today's Court establish a principled approach to physical victimization caused by persistent overcrowding? Prisoners, like their civilian counterparts, can not be guaranteed a danger-free environment. But in prisons and jails across the country, sexual attacks continue to be perpetrated every day. The combination of rape with infection from one of the world's most deadly diseases, AIDS, poses a special dilemma. Are the potential enhanced dangers associated with prison overpopulation — increased violence and unchecked housing of dangerous and possibly virus-infected inmates with the general prison population — a sufficiently substantial intolerable risk to call the Eighth Amendment into play? Or are prisons, like society, to be considered dangerous places, where some level of brutality and sexual aggression is to be expected?[230] Wilson focused on concrete evidence of immediate physical harm arising from overcrowding. By comparison, *Helling* espoused a broader view that seemed to encompass latent mental, physical, and emotional harm arising from prison conditions.[231] *Farmer* never addressed the question, and thus gave no direction as to how the Court may quantify intolerable risks.[232]

The most important aspect would appear to be the actual conditions under challenge. Overcrowding has a negative effect on nearly every as-

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229. *See Rhodes*, 452 U.S. at 348-49 n.13.

230. Judge Easterbrook believes that prisons are dangerous places and that "some level of brutality and sexual aggression among inmates is inevitable." McGill v. Duckworth, 944 F.2d 344, 345, 348 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992).

231. In *Farmer*, Justice Souter confirmed that a subjective deliberate indifference test does not require prisoners to actually suffer physical injury in order to obtain judicial relief. *Farmer*, 114 S. Ct. at 1983. Insofar as the inmate seeks "to prevent a substantial risk of serious injury from ripening into actual harm, 'the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct.' " *Id.* (quoting Helling v. McKinney, 113 S. Ct. at 2477). The inmate is, however, required to come forward with evidence that can establish that the prison officials are "knowingly and unreasonably disregarding an objectively intolerable risk of harm." *Id.*

232. The *Farmer* Court acknowledged that prison rape is not constitutionally tolerable and that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society'." 114 S. Ct. at 1977 (quoting Rhodes, 452 U.S. at 347). But lower federal courts uniformly assumed that prison officials had a duty to protect prisoners from violence from other prisoners. "At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present and we do not address it." *Id.* at 1977 n.3.

pect of a prisoner's life.[233] It not only breeds violence, but increases health risks, aggravates gastric illnesses due to hurried eating in a noisy and stressful environment, and exposes inmates to contagious disease. The ability to handle the mental health problems of inmates is also drastically impeded.[234] In this respect, the prison deficiencies occasioned by overcrowding must be considered together. Even if no single condition would itself be unconstitutional, each affects the other, and exposure to the cumulative effect may subject inmates to cruel punishment.[235] To this end, the *Rhodes* Court permitted judges to look at the combination of circumstances,[236] permission that was retracted by clever word juggling in *Wilson*.[237]

Furthermore, the cruel punishment clause is not bound by the infliction of physical pain.[238] Psychological, no less than physical pain can be diagnosed and quantified.[239] The Court has not hesitated to include future physical harm within the Eighth Amendment's orbit.[240] Medically, potential psychological and physiological risks are intertwined, one nourishing the other.[241] On the outer perimeter is the question of the need for rehabilitative treatment to aid in the reformative process.[242] Prison con-

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233. "The fact that our prisons are badly overcrowded and understaffed may well explain many of the shortcomings of our penal systems." *Farmer*, 114 S. Ct. at 1987 (Blackmun, J., concurring).

234. *See* Capps v. Atiye, 495 F. Supp. 802 (D.C. Ore. 1980). The court concluded that overcrowding at the Oregon State Penitentiary:

> has increased the health risks to which inmates are exposed; has impinged on the proper delivery of medical and mental health care; has reduced the opportunity for inmates to participate in rehabilitative programs; has resulted in idleness; has produced an atmosphere of tension and fear among inmates and staff; has reduced the ability of the institutions to protect the inmates from assaults; and is likely to produce embittered citizens with heightened antisocial attitudes and behavior.

*Id.* at 812-13.

235. *See* Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977).

236. *Rhodes*, 452 U.S. at 363 n.10 (Brennan, J., concurring) (explaining that "The Court today adopts the totality-of-the-circumstances test.").

237. *See* discussion of Wilson v. Seiter, 501 U.S. 294 (1991), *supra* notes 103-21 and accompanying text.

238. Trop v. Dulles, 356 U.S. 86, 101 (1958). The Supreme Court concluded that termination of citizenship destroyed the individual status in society, and was "more primitive than torture." Many federal courts have equated the deterioration of a prisoner's mental and emotional well-being with punishment. *See, e.g.*, Battle v. Anderson, 447 F. Supp. 516 (E.D. Okla.), *aff'd*, 564 F.2d 388, (10th Cir. 1977); Palmigiano v. Garrachy, 443 F. Supp. 956, 979 (D.R.I. 1977); Laaman v. Helgemoe, 437 F. Supp. 269, 307 (D.N.H. 1977).

239. Hudson v. McMillian, 112 S. Ct. 995, 1004 (1992) (Blackmun, J., concurring).

240. Helling v. McKinney, 113 S. Ct. 2475 (1993); *see supra* notes 149-57 and accompanying text for a discussion of *Helling*.

241. Justice Blackmun would include psychological harm, commenting that "[p]ain in its ordinary meaning surely includes a notion of psychological harm." *Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring).

242. Justice Brennan seemingly considers rehabilitation as part of the constitutional equation. He would find prison conditions unconstitutional when "the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration." *Rhodes*, 452 U.S. at 364 (Brennan, J., concurring).

Note the court's comment in *Holt*:

ditions affect more than the inmate's body — they may also affect the inmate's ability to make moral choices, to become self-determining. A lack of rehabilitative programs obviates the possibility of choice. Totally inadequate opportunities for rehabilitation contribute to physical and mental deterioration.[243] Tension, anxiety caused by fear of homosexual attacks, and callousness among correctional staff all lead to the degeneration of the inmate's attitude and emotional stability.[244]

But, when measuring societal response to prison conditions, at what point on the scale does the condition fail to pass constitutional muster? Justice Powell offered some guidelines. He confirmed that no static test can exist, that standards of decency do, and should, change.[245] Judgments, to the maximum extent possible, should be informed by objective factors to assure that the decisions are not "nor appear to be merely the subjective view of judges."[246] Accordingly, prison conditions must not involve wanton and unnecessary infliction of pain, nor be grossly disproportionate to the severity of the crime. But from where are these "objective indicia" to be derived? The Supreme Court has become the barometer of society's standards of decency, but has failed to delineate the variables. To a great extent the Court speculates upon the societal view and this, of course, invites the Justices to project personal predilections.

Broad and idealistic "concepts of dignity, humanity, and decency" are elusive terms. The "deliberate indifference" standard suffers from a high degree of subjectivity. "Malicious and sadistic" as well as "sufficiently substantial risk" lack a sense of predictability. Ultimately, what is cruel punishment is contextual.[247] Since restrictive and even harsh prison conditions are part of the penalty that criminals may pay, extreme deprivations are required to cross the constitutional line. Scientific and statistical reports are the authoritative evidence of potential harm. Expert testimony and modern correctional policy statements document what

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> This Court knows that a sociological theory or idea may ripen into constitutional law; many such theories and ideas have done so. But, this Court is not prepared to say that such a ripening has occurred as yet as far as rehabilitation of convicts is concerned. Given an otherwise unexceptional penal institution, the Court is not willing to hold that confinement in it is unconstitutional simply because the institution does not operate a school, or provide vocational training, or other rehabilitative facilities and services which many institutions now offer.

309 F. Supp. at 379.

243. *See* Pugh v. Locke, 406 F. Supp. 318, 326 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part and rev'd in part sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978), *cert. denied*, 438 U.S. 915 (1978).

244. *See, e.g.*, Smith v. Fairman, 528 F. Supp. 186 (C.D. Ill. 1981), *rev'd*, 695 F.2d 122 (7th Cir. 1982).

245. *Rhodes*, 452 U.S. at 346.

246. *Id.*

247. *See, e.g.*, *Hudson*, 112 S. Ct. at 1000. Inmates claiming prison officials used excessive force need not have suffered a serious injury to sustain a claim of cruel and unusual punishment. In excessive force cases, contemporary standards of decency are violated anytime a prison official maliciously and sadistically uses force to cause harm. *Id.* at 999-1000.

contemporary standards should require. But these studies do not sufficiently measure societal responses: the objective indicia that reflect the public attitude. Determining an acceptable degree of risk is extremely problematic. At the bottom, there is no way for the Court to conclusively capture society's "contemporary notions of decency"[248] and, ultimately, individual justices do read their own values into the Eighth Amendment.[249]

The death penalty debate provides a useful paradigm. In this dialogue, Justice Brennan argued that contemporary decency standards evolved to a point where capital punishment was no longer acceptable.[250] Justice Stewart, however, commented that at least 35 states had re-enacted death penalty statutes, and that Gallop and Harris polls concluded that more than a majority favored the death penalty.[251] Justice Marshall determined that evolving standards of decency may be inferred from an informed citizenry, and that if the public had been informed about the death penalty and its effectiveness, their opinions would be different.[252] Thus, as applied to the death penalty, for one justice it was an exercise in polling the populace, for another speculation as to an informed citizenry, and for a third a vehicle for projecting personal value choices.

Recognizing the elusive nature of trying to affix realistic yet humane standards to prison conditions, Justice Brennan believed that, in the end, the Court is left to rely on its own experience and on its perception of contemporary standards.[253] To this end experts are of great value in helping to gauge prevailing norms, but they alone do not suffice to establish contemporary standards of decency.[254] To determine whether prison conditions pass constitutional muster, a court must examine the actual effect of challenged conditions upon the well-being of the prisoners. The court must, through observation, expert testimony, correctional standards and goals, and the employment of common sense arrive at its conclusions.[255] The treatment of prisoners most assuredly will gauge the development of our society. As the Supreme Court struggles to calibrate standards of decency, some subjectivity is inevitable.[256] The search demands that each Justice apply moral principles as the Court strives to capture the basic theme, the protection of the dignity of man.[257]

248. *Id.* at 1009 (Thomas, J., dissenting).
249. *See* Gregg v. Georgia, 428 U.S. 153, 227-29 (1976) (Brennan, J., dissenting).
250. *Id.* In Justice Brennan's view, capital punishment shocked the conscience of society.
251. *Id.* at 179-81.
252. *Id.* at 232 (Marshall, J., dissenting).
253. *Rhodes*, 452 U.S. at 364 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).
254. *Id.* at 364 n.12.
255. *Id.* at 367 n.16.
256. Gregg v. Georgia, 428 U.S. 153, 228-29 (1976) (Brennan, J., dissenting).
257. *Id.* at 228-29 (Brennan, J., dissenting).

# Book Review